No. 94-1753

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Supreme Court of the United States

OCTOBER TERM, 1994

MANUFACTURAS INTERNACIONALES LTDA; ABUCHAIBE HNOS LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; and INDUSTRIAS MARATHON LTDA,

Petitioners,

—v.—

MANUFACTURERS HANOVER TRUST BANK COMPANY; BANCO ATLANTICO and THE BANK OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER PETITIONERS HAVE SHOWN SPECIAL AND IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI WHERE THE SECOND CIRCUIT COURT OF APPEALS HAS THREE TIMES CORRECTLY HELD THAT NO "INTERCEPTION" OCCURRED HERE.

II. WHETHER PETITIONERS HAVE SHOWN SPECIAL AND IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI WHERE THE SECOND CIRCUIT COURT OF APPEALS HAS TWICE CORRECTLY HELD THAT THE RESPONDENT BANKS' RELIANCE UPON COURT WARRANTS, COURT ORDERS, DEA SUBPOENAS AND THE AUTHORITY OF THE UNITED STATES UNDER THE FEDERAL FORFEITURE LAWS AFFORDS THE BANKS A COMPLETE DEFENSE AGAINST PETITIONERS' CLAIMS.

III. WHETHER, EVEN ASSUMING THE SECOND CIRCUIT'S DECISION HERE WERE SOMEHOW ARGUABLY INCORRECT, PETITIONERS HAVE PROVIDED ANY SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

LIST OF PARTIES

Pursuant to Rule 24.1(b) of the Supreme Court of the United States, the following is a list of parties to the petition:

The Petitioners are Manufacturas Internacionales Ltda.; Abuchaibe Hnos Ltda.; Comercial Samora Ltda.; Creaciones Viviana Ltda.; Comercial Estrella Ltda.; Confecciones y Tejidos Nacionales Ltda.; Manufacturera Del Atlantico Ltda.; and Industrias Marathon Ltda.

Respondents are Manufacturers Hanover Trust Company, Banco Atlantico, S.A. and The Bank of New York.

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Manufacturers Hanover Trust Company (whose successor by merger is Chemical Bank) identifies the following parent companies, subsidiaries and affiliates:

> Chemical Banking Corporation, Brown & Company Securities Corporation, CBC-USA, Inc., CBC Capital Partners, Inc., CBC Holding (Delaware), Inc., Chemical Bank Delaware, CBD Holdings Ltd., SFC Agency, Inc. (OH), Chemical Data Services Corporation, Chemical Insurance Agency, Inc., The CIT Group Holdings, Inc., Chatham Ventures, Inc., Chemadvertising, Inc., Chemical Bank, Chemical Bank National Association, Margaretten Financial Corporation, Chemical Residential Mortgage Corporation, Margaretten Insurance Agency Inc., MRG Finance Company, Margaretten Financial Services, Margaretten Realty Co., Chemical Business Credit Corp, Chemical Capital Corporation, Chemical Capital Financing, Ltd., Chemical Commercial Real Estate Advisors, Inc., Chemical Connecticut Corporation, Chemical Educational Services Corporation, Tuition Plan Financial Services, Inc., Chemical Equity Incorporated, Chemical Venture Capital Corporation, Chemical Corporate Advisers, Inc., Chemical Financial Services, Inc., Chemical Financial Services Corporation, Ltd., Chemical Financial

Services Corporation (AZ), Chemical Financial Services Corporation (CA), Chemical Financial Services Corporation (FL), Chemical Financial Services Corporation (GA), Chemical Financial Corporation (IL), Chemical Financial Services Corporation (NC), Chemical Financial Services Corporation of Penn., Chemical Financial Services Corporation (TX), Chemical Financial Services Corporation (WA), Chemical Financial Services Corporation (CO), Chemical Financial Services Corporation (IN), Chemical Financial Services Corporation (KY), Chemical Financial Services Corporation (LA), Chemical Financial Services Corporation (SC), Chemical Financial Services Corporation (TN), Chemical Financial Credit Services Corporation (KY), Sun States Life Insurance Company, Great Lakes Insurance Company, Lorry, Ltd., Chemical Financial Investment Corporation, Chemical Financial Services Corporation (OH), Chemical Financial Acceptance Corporation (OH), Chemical Futures, Inc. (Inactive), Chemical Futures & Options, Inc., Chemical Futures Management, Inc., Chemical Holding Delaware Inc., CBC Holdings (California) Inc., Van Deventer & Hoch, Chemical Thrift Holdings Inc., Chemical Bank F.S.B., Chemical Trust Company of California, Chemical Investments, Inc., Chemical International Capital Finance Limited, Chemical Mortgage Securities, Inc., Chemical New Jersey Holdings, Inc., Chemical Bank New Jersey National Association, Chemical Investor Services, Inc., Princeton Bank and Trust Company National Association, Chemical New York, Inc., Chemical New York - N.V., Chemical Real Holdings, Inc., Chemical Realty Corporation, Chemical Securities Inc., Chemical Structured Municipal Products Corporation, Chemical Securities Holdings, Inc., Chemical Shareholders Services of California, Inc., Chemical Shareholder Services Partners Inc., Chemical Mellon Shareholder Services (50%), Chemical Technologies Corporation, Electronic Customer Services, Inc., Chem-

ical Temporaries Incorporated, Chemical Trading Management Corporation, COREQ, INC., CVP Management Corp., Manufacturers Hanover Leasing International Corp., Manufacturers Hanover Leasing (Nassau) Limited, Manufacturers Hanover Arrendamento Mercantil S.A., Manufacturers Hanover Wheelease, Inc., MH World Trade Corporation Mexico, Offshore Equities, Inc., The Andean Fund, Inc., Equifin, Chemical Overseas Holdings, Inc., Select Andean Holdings, Inc., Select Brazilian Holdings, Inc., Chempar Participacoes e Emprendementos Ltd., Select Capricorn Holdings, Inc., Select Cassiopeia Holdings, Inc., Select Life Holdings, Inc., Select Orion Holdings, Inc., Select Pacific Holdings, Inc., Select Rio Grande Holdings, Inc., Select Southern Holdings, Inc., Select Southern Star Holdings, Inc., Sociedad Mexicana Para La Industria Y El Comercio S.A., The Portfolio Group, Inc., Texas Commerce Equity Holdings Inc., Texas Commerce Operating Services Inc., Chemical Securities of Texas, Inc., First City, Texas - Fiduciary Services, Inc., Texas Commerce Equities Inc., Pyramid Agency, Inc., Texas Commerce Information Systems, Inc., Texas Commerce Bank Foundation, Inc., Texas Commerce Funding Company, TexCom Venture Capital, Inc., Texas Commerce Shareholders Company, Texas Commerce Services Company, Texas Commerce Leasing Company, Texas Commerce Investment Management Co., Texas Commerce Bank-San Angelo, N.A., Texas Commerce Trust Company of New York, Texas Commerce Bank National Association Houston, Texas Commerce Equipment Leasing Company, Texas Commerce International Leasing Company, Texas Commerce Investment Company.

Chemical Bank owns a fifty percent interest or more in the following subsidiaries:

CB Capital Investors, Inc., Chemical Acceptance Corporation, Chemical Acceptance Corporation I, Chemical

Mortgage Acceptance Corporation, Chemical Bank of Canada, Chemical Clearing House Services, Inc., Chemical Commercial Mortgage Banking Corp., Chemical Commercial Mortgage Securities Corp., Chemical Community Development, Inc., Chemco International, Inc., Chemical International Finance, Ltd., Banco Chemical (Portugal) S.A., Chemical Bank - France, Chemical Bank A.G., Chemical Investment Bank Limited, Chemical Bank CB, S.A., Chemical Global Investors Limited, Chemical Investment Services Corp., Chemical Mortgage Company, Chemgraphics Systems, Inc., ChemLease Worldwide, Inc., ChemNetwork Processing Services, Inc., Chem Credit, Inc., Manufacturers Hanover Leasing Corporation, MH Financial Management Systems, Inc.

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, The Bank of New York identifies the following parent companies, subsidiaries and affiliates:

The Bank of New York Company, Inc., ARCS Mortgage Holdings, Inc., ARCS Mortgage, Inc. (California), Armot Corporation, Armot Corporation of Washington, B.N.Y. Holdings (New Jersey) Corporation, The Bank of New York N.A., NLB Investment Company, Inc., Natcom Investments, Inc., B.N.Y. Holdings (Delaware) Corporation, The Bank of New York (Delaware), The Bank of New York Overseas Finance N.V., Lease Equities (Delaware) Corporation, Lease Equities (Texas) Corporation, BNY Business Center, Inc., BNY Capital Corporation, BNY International Trade, Inc., BNY Trade Insurance, Ltd., BNY One Leasing Corporation, BNY Personal Brokerage, Inc., Capital Trust Company, Eastern Trust Company, Irving Financial Centers, Inc., North American Bancorp., Inc., The Bank of New York Life Insurance Company, Inc., The Bank of New York Trust Company, The Bank of New York Trust Company of California, The Bank of New York Trust Company of Florida N.A.;

The Bank of New York, BNY Associates Incorporated, BNY Leasing Corporation, Airlease Incorporated, Airlease Foreign Sales Corporation, BNY Capital Funding Corp, BNY New Amsterdam, Inc., Flugel FSC, Ltd., BNY Waterworks, Inc. (99.09%), BNY Wings, Inc., BNY Wings FSC, Inc., ILC Gear Inc., IRE-1, Inc., IRE-AC, Inc., New GSM Holding Corporation, IRE-Aurora, Inc., IRE-BC, Inc., IRE-SB, Inc., IRE-WWP, Inc., Irving Leasing Foreign Sales Corporation, ENMASS, Inc., Flamingo Plaza Realty, Inc., Forty-First Street Holdings, Inc., GH Holdings Inc., Green Island Realty, Inc., Hamlet Holdings, Inc., Horizon at Wayne, Inc., Hulfish Beverage Corp., Hull Junction Holding Corp., IDC (Queens) Corp., Jefferson Plaza Properties Inc., Karpen Properties, Inc., Village Beverage Co., Inc., Landmark Tower, Inc., Linroad Holding Corp., Linroad Realty, Inc., Longtuco Realty Corporation, MacArthur Holdings, Inc., Miami Kendall Properties, Inc., Mid-Plaza Holdings, Inc., MTD Shipping Inc., Newmex Holding, Inc. NO FRILLS, Inc., Odysseus Properties, Inc., One Wall Street Corporation, OVD Holding Inc., Pacshore Holding, Inc., PBP Holdings Inc., Plymouth Holding Inc., Pohio Holding Inc., PresPark, Inc., Rivohio Holding Inc., Robin Investments, Inc., Station Mall, Inc., Techcen, Inc.. Techcen II, Inc., The Fourteen South Broadway Corporation, Valley Premises, Inc., Venetia Realty, Inc., VHPL II, Inc., Walnut Hill Center Corporation, Willowtrail Holding Inc., Wolham Holdings, Inc., Wolpheas Holdings, Inc., Wolstat Holdings Inc., WP Hotel, Inc., Island Waterworks, Inc. (90%), ITC Leasing Corporation, Northern Waterworks, Inc. (99.09%), Waterwheel, L.P. (Partnership) (99%), BNY Generator Lessor, Ltd., BNY Turbine FSC, Ltd., BNY Turbine FSC II, Ltd., BNY Turbine FSC III, Ltd., BNY Turbine FSC IV, Ltd., JCPL Leasing Corp., BNY Financial Corporation, BNY Information Services, Inc., BNY International Financing Corporation, BNY Special Nominees No. 1 Limited, The Bank of New York

(Nominees), Ltda., BNY (Nominees) Limited, The Bank of New York Assessoria E. Consultoria, Ltd., The Bank of New York Capital Markets Limited, The Bank of New York Trust Company (Cayman), Limited, Banco Credibanco, S.A. (50%), BK Investments, C.A., BNY Australia Limited, BNY Australia Finance Holdings Limited, BNY Worldwide Services Co., Ltd., Compania Dowson, S.A., Irving Trust Company (Nominees) Ltd., Wing Hang Bank, Limited (49%), Banco Weng Hang S.A.R.L., BNY One Capital Corporation, The Bank of New York Commercial Corporation, The Bank of New York Consumer Leasing Corporation, The Bank of New York, S.A., ITCMED, Inc., Sloane Holdings, Inc. (66-2/3%), EPHCO, Inc., LCHCO, Inc., SCHCO, Inc., XYXYXY Corporation, Real Estate Subsidiaries, 65th Street Townhouse, Inc., 200 Lombard St. Corp., Allohio Holding Inc., Bogohio Holding Inc., Burbank Holdings Inc., Ca-Tar Properties, Inc., Claymont Holdings, Inc., Cronos Properties, Inc., Design Center Bus Company, Inc., Eight Stamford Realty Corporation, Empark, Inc., Empro Properties, Inc.

Banco Atlantico has no parent companies or subsidiaries.

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COUNTERSTATEMENT OF THE CASE

Respondents Chemical Bank (as successor to Manufacturers Hanover Trust Company ("MHT")), The Bank of New York ("BNY") and Banco Atlantico, S.A. ("Banco Atlantico") (collectively the "Banks") respectfully submit this joint brief in opposition to Petition No. 94-1753 submitted by Manufacturas Internacionales Ltda., Abuchaibe Hnos Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones Y Tejidos Nacionales Ltda., Manufacturera Del Atlantico Ltda. and Industrias Marathon Ltda. (collectively "Petitioners").

A. THE UNDERLYING ACTIONS

This petition for a writ of certiorari marks the fifth occasion that this Court has been asked to review the seizure and forfeiture of electronic funds transfers ("EFT's") stemming from a 1990 international investigation into the money laundering activities of the Cali drug cartel. This investigation led to the forfeiture to the United States Government of some ten million dollars in a civil forfeiture action entitled *United States v. All Funds On Deposit In Any Accounts Maintained At Merrill Lynch, et al.* ("*All Funds*"), 801 F. Supp. 984 (E.D.N.Y. 1992), *aff'd sub nom., United States v. Daccarett* ("*Daccarett*"), 6 F.3d 37 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1294, 1295 (1994). *See also Organizacion JD Ltda. v. United States Department of Justice* ("*Organizacion JD*"), 18 F.3d 91 (2d Cir.), *cert. denied*, 114 S. Ct. 2679 (1994); *Manufacturas International, Ltda v. Manufacturers Hanover Trust Co.* ("*Consolidated Cases*"), 792 F. Supp. 180 (E.D.N.Y. 1992), *appeal withdrawn per stipulation*, No. 92-7360 (2d Cir. 1992), *cert. denied*, 114 S. Ct. 1295 (1994), *aff'd*, 47 F.3d 1159 (2d Cir. 1995).

The Banks maintained correspondent banking relationships with various Colombian banks at which Petitioners allegedly maintained accounts. The Banks were recipients of EFT's originating from certain European banks; the Banks were in

turn to transfer corresponding amounts of funds to their Colombian correspondents' accounts. The proceeds of the EFT's, however, were seized by the Government after receipt by the Banks, but before the transfers to the Colombian banks' accounts were effected. These proceeds subsequently were forfeited to the United States after a jury in *All Funds* determined that the EFT's were traceable to illegal transactions in narcotics and that Petitioners were not "innocent owners" of the funds.

Here, Petitioners sued the Banks for having complied with various Warrants for Arrest of Articles *In Rem*, Court Orders, Drug Enforcement Agency ("DEA") Administrative Subpoenas and instructions from the United States Attorney, all issued in connection with *All Funds*, which compelled the Banks to disclose information contained in EFT payment orders, and to pay the proceeds of the EFT's into Court.

Petitioners asserted in the District Court that, in complying with the Warrants for Arrest and other directives, the Banks violated the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2501, *et seq.* (the "Wiretap Act"), as amended by the Electronic Communications Privacy Act, 18 U.S.C. § 2701, *et seq.* (the "ECPA"); the Right to Financial Privacy Act, 12 U.S.C. § 3401, *et seq.*; and Uniform Commercial Code Article 4-A. Petitioners also asserted that, among other things, the Banks violated their "right to privacy" under New York law, and that, by paying the EFT proceeds into District Court, the Banks breached third-party contracts of which Petitioners were beneficiaries. The District Court granted summary judgment to the Banks dismissing all of Petitioners' claims. *Consolidated Cases*, 792 F. Supp. 180.

On appeal, Petitioners sought review only of that portion of the District Court's decision that held that Petitioners had no claim under the Wiretap Act or the ECPA (collectively the "ECPA"). The Second Circuit affirmed the District Court's dismissal of these claims against the Banks. 47 F.3d 1159 (Pet. App. B).

B. PROCEDURAL HISTORY

In three separate but related actions stemming from the 1990 civil forfeiture action, the Second Circuit has ruled adversely to the positions advanced herein by Petitioners. Set forth below is a summary of each of the related cases.

1. *All Funds/Daccarett*

All Funds (801 F. Supp. 984) (which was reported on appeal as *Daccarett* (6 F.3d 37)) resulted from an extensive money laundering investigation in which the United States claimed that the EFT's at issue in this petition (among others) were subject to forfeiture as the proceeds of narcotics crimes. The Banks were not parties to *All Funds*, but acted as intermediary banks for the EFT's and as such complied with court warrants, court orders, DEA subpoenas and instructions given by the United States pursuant to its statutory authority under the federal forfeiture laws. Petitioners were claimants to certain EFT's seized by the United States.

Following a two-month trial, the *All Funds* jury returned a verdict forfeiting approximately $10,000,000 to the United States and returning approximately $300,000 to two of the claimants, neither of which is a party to this action. The claimants whose funds were forfeited, including all the Petitioners here, appealed to the Second Circuit, which affirmed the judgment of the District Court in a decision dated September 10, 1993, and denied a petition for rehearing on October 6, 1993. On March 21, 1994, this Court denied the *Daccarett* appellants' petition for a writ of certiorari. 114 S. Ct. 1294, 1295.

2. *The Consolidated Cases*

While *All Funds* was pending in the Eastern District of New York, Petitioners filed ten separate actions in the Southern District of New York against the Banks. These actions were consolidated and transferred to the Honorable Jack B.

Weinstein in the Eastern District, and the Banks moved to dismiss the consolidated action pursuant to Fed. R. Civ. P. 12(b)(6). Judge Weinstein converted the motion to one for summary judgment and, following the submission of affidavits and memoranda by both sides and oral argument, granted the Banks' motion in its entirety on February 27, 1992. *Consolidated Cases*, 792 F. Supp. 180.

After the entry of the order dismissing the complaint, Petitioners filed a notice of appeal. Before perfecting the appeal, however, the parties voluntarily entered into a stipulation in which Petitioners agreed to withdraw their appeal with leave to reinstate "within 15 days after final disposition, including all appeals of [*All Funds*]." Petitioners subsequently attempted to repudiate the stipulation and moved to reinstate their appeal before final disposition of *Daccarett*, but the Second Circuit denied their motion.

In addition, despite the stipulation and the fact that no appeal was pending in the Court of Appeals, Petitioners filed seven separate petitions for writs of certiorari to this Court, raising essentially the same arguments they raise here. On March 21, 1994, this Court denied the petitions for writs of certiorari. 114 S. Ct. 1295.

Following the denial of the petition for a writ of certiorari in *Daccarett*, Petitioners perfected their appeal pursuant to the terms of the stipulation. Once again, the Second Circuit (by a panel entirely separate from that in *Daccarett*) reviewed the seizure and forfeiture of the EFT's and, on January 30, 1995, affirmed the District Court's dismissal of the ECPA claims against the Banks. Pet. App. B.

3. *Organizacion JD*

After the conclusion of the *All Funds* trial, the two claimants whose funds had not been forfeited brought an action against the United States Department of Justice, The DEA, Banco Atlantico and BNY. On December 3, 1992, the

District Court granted motions by the Banks and the United States to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). Following the dismissal of the action, the plaintiffs, who were represented by the same counsel as the Petitioners here, appealed to the Second Circuit. *See Organizacion JD*, 18 F.3d 91.

The Second Circuit (by a panel entirely separate from those in *Daccarett* and this action) affirmed the dismissal of all counts against the Banks, but reversed and remanded the portion of the District Court's decision that dismissed claims against the United States under 18 U.S.C. § 2707(a) for alleged violations of the ECPA. *See Organizacion JD*, 18 F.3d at 95.

While their appeal was pending in the Second Circuit, the *Organizacion JD* appellants petitioned for a writ of certiorari from this Court. The Supreme Court denied the petition on March 21, 1994. 114 S. Ct. 1295. Following the issuance of the Second Circuit's decision, the *Organizacion JD* appellants again sought a writ of certiorari from this Court, and again were denied. 114 S. Ct. 2679.

C. BACKGROUND

This action arises from the Banks' compliance with various Warrants for Arrest of Articles *In Rem*, Court Orders, subpoenas and instructions from the United States Attorney, all issued in connection with the *All Funds* civil forfeiture action. Petitioners claimed to be the ultimate beneficiaries of some of the EFT's seized by the Government and ultimately forfeited.

The forfeitures in *All Funds* were the result of an international investigation into the activities of the Cali cartel, which imports approximately 3,000 kilograms of cocaine into the United States every month. *Daccarett*, 6 F.3d at 43.[1] In the

[1] As the Second Circuit noted in *Daccarett* at 43, the magnitude of this problem for the United States and its financial institutions cannot be underestimated:

(footnote continued on next page)

two-month jury trial in *All Funds*, Petitioners failed to establish that the proceeds of the EFT's were not traceable to transactions in illegal narcotics by the Cali cartel or that Petitioners were innocent owners of the EFT proceeds. Indeed, while Petitioners claim that they are merely Colombian clothing export companies, the evidence linking Petitioners to illegal drug trafficking and money laundering by the Cali cartel was, in the Second Circuit's view, "overwhelming." *Daccarett*, 6 F.3d at 44, 57, 59.

In July and August 1990, the Banks acted as intermediary banks for the EFT's and complied with court warrants, court orders and instructions from the United States Attorney by attaching the EFT proceeds and paying them into Court. The Banks also complied with lawful DEA subpoenas requiring them to disclose relevant account information concerning the EFT's.

None of the Petitioners maintained accounts at the Banks. Rather, they allegedly were customers of Colombian banks that, in turn, maintained correspondent banking relationships with one or more of the Banks. To effect the wire transfers, the Banks were supposed to credit the Colombian banks' correspondent accounts in New York. The Colombian banks would, in turn, advise their customers of the credits to their accounts. *See Consolidated Cases*, 792 F. Supp. at 185.

Illegal sales of controlled substances generate billions of dollars in revenue every year. Narcotics traffickers continually seek to make their illegal income appear legitimate. When international drug conglomerates attempt to move their profits beyond the reach of law enforcement authorities, these monies are frequently funneled through financial institutions in the United States. Money laundering has become so sophisticated "that it is not unusual to find an intricate web of domestic and foreign bank accounts, dummy corporations and other business entities through which funds are moved, almost instantaneously, by means of electronic fund transfers." House Committee on Banking, Finance and Urban Affairs, H.R. Rep. No. 746, 99th Cong., 2d Sess. 16 (1986).

As the Second Circuit noted in *Daccarett*, 6 F.3d at 54:

> On receipt of EFT's from originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating bank through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun.

See also Consolidated Cases, 792 F. Supp. at 187 ("In the instant case the sending banks are in Europe, the intermediary banks are in New York, and the correspondent banks are in Colombia. The funds transfers were seized at the intermediary banks before the funds were credited to the Colombian correspondent banks.")

The Banks, as intermediary banks, were necessary parties to and intended recipients of the EFT communications. The EFT's could not be completed unless and until the Banks were told that their accounts had been credited, and how they were to apply the funds. It is this information necessary to the EFT's that the Banks are alleged to have disclosed to the Government in violation of the ECPA. However, as the Second Circuit recognized in *Daccarett*, *Organizacion JD* and *Consolidated Cases*, no "device" was used to effectuate the seizures, and thus no "interception" occurred under the ECPA. *Daccarett*, 6 F.3d at 54; *Organizacion JD*, 18 F.3d at 94; *Consolidated Cases*, Pet. App. B at 3-6.

Furthermore, before the Banks received the EFT communications, the United States District Court for the Eastern District of New York had on or about July 18, 1990 issued a Supplemental Warrant for Arrest of Articles *In Rem*, based upon a Third Amended Complaint in *All Funds*, commanding the Banks to attach "all funds transferred to, through and by" the Banks to Colombian banks for the ultimate benefit of certain named beneficiaries and "all related entities and individuals."[2]

The Banks, which were required to comply with lawful court orders, had no information with which to determine whether any particular EFT beneficiary was a "related" entity. In order to identify the "related" entities, the United States Attorney instructed the Banks to provide information concerning each EFT directed to accounts maintained with the Banks by the Colombian banks. The United States Attorney identified which beneficiaries were related entities and ordered the Banks to attach specific EFT proceeds. The Banks, in a good faith effort to comply with the Warrants for Arrest, followed the Government's orders.

Over the course of the next several weeks, from July 18, 1990 through August 3, 1990, the United States Attorney's Office for the Eastern District of New York supplemented these instructions and orders with the Fourth, Fifth, Sixth and Seventh Amended Complaints together with accompanying Supplemental Warrants for Arrest *In Rem*. All of the Petitioners ultimately were specifically identified as entities whose funds were to be attached.

On or about July 25, 1990, the Banks were served with a "Summons To Snow Cause Why Intangible Property Should Not Be Paid Into Court." This Show Cause Order covered

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[2] On May 13, 1991, Magistrate Judge A. Simon Chrein found that the Government had shown in *All Funds* probable cause "to believe that the defendant funds constitute the proceeds of narcotics trafficking and/or money laundering" under 21 U.S.C. § 881(i) and 18 U.S.C. § 981(g). *Daccarett*, 6 F.3d at 45.

both the funds described in the Warrants for Arrest, and "any and all funds subject to the instant action which are hereinafter deposited, transferred, identified, located, frozen or otherwise discovered or acquired. . . ." The Banks, in compliance with the order, segregated the EFT proceeds and paid them into Court.

The uncontroverted evidence thus establishes that, in sequestering the EFT's and ultimately paying the proceeds into Court, and in providing information concerning the EFT's to the Government, the Banks were doing nothing more than complying with the legal obligations imposed upon them by the express terms of the Warrants for Arrest, DEA subpoenas and Court Orders, as well as by the instructions of the United States pursuant to its authority under the Federal forfeiture laws.

SUMMARY OF THE ARGUMENT

The Second Circuit has three times correctly held that no "interception" occurred here; accordingly, the Banks cannot be liable under the ECPA. The Banks, as the intended recipients of EFT communications, properly received such communications in the ordinary course of their business, and hence did not "intercept" them.

Furthermore, as the Second Circuit has twice correctly held, the Banks' reliance upon court warrants, court orders, DEA subpoenas and the authority of the United States under the Federal forfeiture laws affords the Banks a complete defense.

In any event, even if the Second Circuit's decision here were somehow arguably incorrect, Petitioners still have provided no "special and important" reasons for granting the extraordinary writ of certiorari.

For all of these reasons, the petition does not raise any issues meriting review by the Court.

REASONS FOR DENYING THE WRIT

Rule 10.1 of this Court's Rules provides that a petition will be granted "only when there are special and important reasons therefor." As shown below, there are no such reasons here.

I

THE BANKS CANNOT BE LIABLE UNDER THE ECPA, SINCE THE SECOND CIRCUIT COURT OF APPEALS HAS THREE TIMES CORRECTLY HELD THAT NO "INTERCEPTION" OCCURRED HERE

Petitioners contend that the Banks are liable for violations of § 2511(1)(a) and (c) of the ECPA. Petitioners' Br. at 24. These subsections prohibit, respectively, the intentional "intercept[ion]" of a wire, oral or electronic communication and the intentional disclosure of the contents of any such communication where the person disclosing knows or has reason to know that the information was obtained through the "interception" of the communication.[3] Section 2510(4) of the ECPA defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication

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[3] Section 2511 states in relevant part:

> (1) Except as otherwise specifically provided in this chapter any person who—(a) intentionally *intercepts*, endeavors to *intercept*, or procures any other person to *intercept* or endeavor to *intercept*, any wire, oral, or electronic communication; . . . (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the *interception* of a wire, oral, or electronic communication in violation of this subsection . . . shall be punished as provided in subsection (4) or shall be subject to suit [by the Federal Government] as provided in subsection (5) (emphasis added).

Section 2520 of the ECPA provides a private right of action, subject to all available defenses, to persons whose communications have been intercepted in violation of § 2511.

through the use of any electronic, mechanical, or other *device*" (emphasis added). Accordingly, as a threshold matter, for the Banks conceivably to have violated § 2511(1)(a) and/or (c), they had to have "intercepted" communications through the use of a "device."

However, as the Second Circuit explicitly and unequivocally held—by three entirely separate panels—in the *Daccarett*, *Organizacion JD* and *Consolidated Cases* appeals:

> . . . [T]he seizures did not constitute "interceptions" under the ECPA because no "device" was used, as required under 18 U.S.C. § 2510(4). *See* Daccarett, 6 F.3d at 54. *Because no "interceptions" occurred, plaintiffs have no cause of action under § 2520* (emphasis added).

Organizacion JD, 18 F.3d at 94. *See also Consolidated Cases*, Pet. App. B at 3-6.

A. The Appeal and Petition Are Barred By Principles of Collateral Estoppel

Since the Second Circuit has expressly ruled in *Daccarett* (an appeal and petition for certiorari joined in by the very same Petitioners here) that no "interception" had occurred under the ECPA, and since this Court has declined to grant certiorari in *Daccarett*, thereby letting the Second Circuit's determination stand, this appeal and petition for certiorari are barred by basic principles of collateral estoppel. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980) (principle of collateral estoppel (or "issue preclusion") bars relitigation of issues that were actually and necessarily decided in prior action where party against whom preclusion is sought had full and fair opportunity to litigate issues in prior action).

B. The Second Circuit Was Correct Each Time In Holding That No "Interception" Occurred Here

Even if there were no preclusive effect arising from *Daccarett*, the record here irrefutably demonstrates that there was no "interception." Indeed, these EFT's could not have been effected unless they were directed to the Banks. The Banks, therefore, as necessary and intended recipients of the EFT's, could not have "intercepted" them; the Banks as addressees simply received the EFT's on equipment designed for that purpose. *See United States v. Andonian*, 735 F. Supp. 1469, 1472 (C.D. Cal. 1990) ("Congress' view of interception can be described as a perpendicular concept, where the interception of a communication crosses its path like the trunk of a 'T' "; thus, the ECPA applies only to "communications which pass from their origin to the intended recipient *and are subject to third-party intervention*" (emphasis added)). As a matter of law and undisputed fact, there was not—and could not have been—any "third-party intervention" by the Banks. Consequently, there could not have been any violation of § 2511(1)(a) or (c) by the Banks.

Petitioners further rely upon § 2511(3)(a) of the ECPA as a purported basis for the Banks' liability. Petitioners' Br. at 18-19, 24-25, 32. This paragraph, however, by its own explicit terms could not and does not apply here. Section 2511(3)(a) provides:

> *Except as provided in paragraph (b) of this subsection*, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (*other than one to such person or entity, or an agent thereof*) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient (emphasis added).

Section 2511(3)(b) goes on to state in relevant part: "A person or entity providing an electronic communication service to the public may divulge the contents of any such communication— . . . (ii) with the lawful consent of the originator *or any addressee or intended recipient of such communication*" (emphasis added). *See also* ECPA § 2702(b)(3) ("[a] person or entity may divulge the contents of a communication . . . with the lawful consent of . . . *an addressee or intended recipient* of such communication" (emphasis added)).

Even assuming that the Banks were "providing an electronic communication service to the public" (which they were not), and that the Banks disclosed the contents of any communications "while in transmission" on an electronic communication service (which they did not), the Banks—as addressees and intended recipients of the communications at issue—were permitted by the express language of §§ 2511(3)(a) and (b) and 2702(b)(3) to disclose the contents of those communications to the United States.[4]

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[4] In typical scattershot and disingenuous fashion, Petitioners also assert in passing that the Banks violated § 2511(2)(a)(i) of the ECPA. Petitioners' Br. at 18-19, 24-25. But once again, the plain language of the statute shows that it has absolutely no application here. This provision states in pertinent part that "a provider of *wire* communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks" (emphasis added). Not only did the Banks *not* use "service observing or random monitoring," they also did *not* provide any "wire" communication service to the public or otherwise. Section 2510(1) of the ECPA defines "wire communication" as an "aural" (*i.e., voice*) transfer made under certain circumstances. The EFT's were "electronic communication[s]" as defined in § 2510(12). *See also Daccarett*, 6 F.3d at 53 (under the ECPA "electronic communications" are different from "oral and wire communications"). Petitioners' incomplete and misleading references to § 2511(2)(a)(i) fail to mention that its prohibition applies only to "wire communication[s]." *See* Petitioners' Br. at 18-19, 24-25.

C. There Is No Conflict Between The Second and Fifth Circuits

Faced with the foregoing, Petitioners contend that the Fifth Circuit Court of Appeals' decision in *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457 (5th Cir. 1994), somehow supports their position that the Banks violated the ECPA and creates a conflict between the Fifth and Second Circuits appropriate for resolution by this Court. This assertion can result only from a serious misreading of the *Steve Jackson Games* decision.

The Court in *Steve Jackson Games* addressed the narrow issue of whether the seizure by the Secret Service of a computer containing stored electronic mail sent to, but not retrieved by, the intended recipients constituted an unlawful interception under the ECPA. Neither the intended recipients of the electronic mail nor the owner of the "electronic bulletin board system" on which the mail was stored authorized the defendant Secret Service to gain access to the stored information. The Fifth Circuit upheld the District Court's determination that the Secret Service did not intercept the electronic mail because the acquisition of the contents of those communications was not contemporaneous with their transmission.

The Fifth Circuit's decision is simply not in conflict with the Second Circuit decisions discussed above. In *Daccarett*, 6 F.3d 37, *Organizacion JD*, 18 F.3d 91, and *Consolidated Cases*, Pet. App. B, the Second Circuit held that no interception occurred under the ECPA, and absent an interception, no liability exists for the Banks. As these decisions and the salient facts make clear, the Banks were the intended recipients of the funds transfers, and could not have "intercepted" them. Nothing in the Fifth Circuit decision compels a contrary result. Indeed, in applying a narrow and common sense definition of "interception," the *Steve Jackson Games* decision strongly supports the Banks' position here.

Furthermore, unlike here, the communications at issue in *Steve Jackson Games* were not obtained or disclosed by or with the authority of an intended recipient, a provider of an electronic communication service or a user of such service. In fact, the plaintiffs in *Steve Jackson Games* were the intended recipients themselves who claimed that the communications to them were seized by the defendant Government without their permission. *Steve Jackson Games* recognizes that under 18 U.S.C. § 2701(a) and (c) a "facility through which an electronic communication service is provided" may be accessed with the authority of an "entity providing . . . [an] electronic communications service" or a "user of that service with respect to a communication of or intended for that user." Here, if the Banks were providing such a facility, they had the authority under § 2701(c) to access it, and, if they were not providing such a facility, they are simply not covered by § 2701(a).[5]

D. State Law and Regulation J Are Entirely Irrelevant Here

Petitioners further endeavor to obfuscate the straightforward issues before this Court by discussing at some length various provisions of state law, including Article 4-A of the Uniform Commercial Code, as well as Regulation J of the Federal Reserve System. *See* Petitioners' Br. at 33-38. These provisions of law, however, are entirely irrelevant here. The fact that under state law and Regulation J ultimate beneficiaries of funds transfers may in some circumstances have a right of action has nothing whatsoever to do with the matters at hand. In failing to press any such claims on appeal here,

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[5] Moreover, assuming *arguendo* that the Banks had intercepted the EFT's or that their conduct arguably violated §§ 2701 or 2702, they acted in reliance upon court warrants, court orders, DEA subpoenas and the authority of the United States, and have a complete defense for having done so. *See* Point II *infra*. *Steve Jackson Games* does not address this issue at all inasmuch as the Government was the only defendant.

Petitioners have acknowledged that they have no such claims. Further, inasmuch as the referenced state law and Regulation J causes of action do not require an "interception" and in no way deal with the concept, such law is entirely inapposite to the key question here, *i.e.*, whether there was an "interception" of communications under 18 U.S.C. § 2510, *et seq.*

For the foregoing reasons, the petition should be denied.

II

THE BANKS' RELIANCE UPON COURT WARRANTS, COURT ORDERS, DEA SUBPOENAS AND THE AUTHORITY OF THE UNITED STATES UNDER THE FEDERAL FORFEITURE LAWS AFFORDS THE BANKS A COMPLETE DEFENSE AGAINST PETITIONERS' CLAIMS

Even if the Banks had "intercepted" communications (which as shown above is not the case), their reliance upon court warrants, court orders, DEA subpoenas and the authority of the United States under the Federal forfeiture laws and rules supplemental thereto still affords the Banks a complete defense in this action.

ECPA § 2520(d) provides in relevant part:

> . . . A good faith reliance on—(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . . is a complete defense against any civil or criminal action brought under this chapter or any other law.

See also ECPA § 2707(d)(1) (identical language to that of § 2520(d)(1)).[6]

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[6] ECPA § 2511(2)(c) also is pertinent here. This paragraph provides a defense to parties to a communication who are "acting under color of law." As discussed in Point I above, the Banks were parties to the communications at issue and thus may avail themselves of this

A. The Banks' "Good Faith Reliance" Provides Them a Complete Defense

The Second Circuit's prior decisions in *Organizacion JD* and *Consolidated Cases* establish beyond peradventure that §§ 2520(d) and 2707(d) afford the Banks a complete defense. In *Organizacion JD*, the Court held:

> . . . We agree with the District Court that the defendant banks cannot be held civilly liable under § 2707(a) for a violation of § 2701 because their good faith reliance on a court warrant or order is a complete defense under § 2707(d)(1). See Manufacturas Int'l, Ltda v. Manufacturers Hanover Trust Co., 792 F. Supp. at 192-93.

18 F.3d at 94. *See also Consolidated Cases*, Pet. App. B at 7 ("Good faith reliance on a court warrant or order is a complete defense under the statute. *See* 18 U.S.C. § 2707(d)(1). . . . The record supports [the District Court's] finding of good faith. . . . ").[7] Accordingly, under fundamental principles of statutory interpretation, fairness and common sense, *Organizacion JD* and *Consolidated Cases* require denial of this petition.

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defense as well. *See also United States v. Barone*, 913 F.2d 46, 48-49 (2d Cir. 1990) (no violation where party to communication is cooperating with Government); *United States v. Rich*, 518 F.2d 980, 985 (8th Cir. 1975), *cert. denied*, 427 U.S. 907 (1976) (no violation where party recorded conversation at direction of Government). *Cf. Young v. United States Department of Justice*, 882 F.2d 633, 640 (2d Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990) (bank's compliance with judicially-authorized subpoena immunizes it from liability to depositor for any required disclosures).

[7] Although *Organizacion JD* involved BNY and Banco Atlantico, and not MHT, its holding clearly applies to MHT as well. Indeed, that holding explicitly relies upon and refers to the District Court's determination in this action that all three banks were provided a complete defense by §§ 2520(d)(1) and 2707(d)(1). In any event, since all three banks are parties herein, the *Consolidated Cases* holding of the Second Circuit obviously applies to each bank.

There is no question that the Second Circuit in *Organizacion JD* and *Consolidated Cases* reached the only proper result. Each of the Banks indisputably acted in good faith reliance on the Warrants for Arrest, the July 25, 1990 Court Order, the DEA subpoenas and the Attorney General's express statutory authority to seize property under 21 U.S.C. § 881(b).

B. It Is Irrelevant Whether The United States Complied With The ECPA

Faced with the Second Circuit's previous dispositive and correct rulings in *Organizacion JD* and *Consolidated Cases* that the Banks are protected by §§ 2520(d) and 2707(d), Petitioners resort to claiming that the Banks are liable because the United States supposedly did not comply with various provisions of the ECPA. *See* Petitioners' Br. at 23-30.[8] Petitioners, however, willfully and fundamentally misread §§ 2520(d) and 2707(d).

Sections 2520(d) and 2707(d) do *not* provide that banks and other institutions may rely only upon a warrant or order that has been issued pursuant to ECPA §§ 2516(3), 2518(7) or 2703(a) or the Federal Rules of Criminal Procedure. (Nor does the ECPA provide that financial institutions are vicariously liable for the conduct of the Government.) If Congress had intended to place limitations upon the types of warrants, orders, *etc.* that banks could rely on, it would have done so. But as the Second Circuit explicitly recognized in *Organizacion JD*, a complete defense is provided under §§ 2520(d) and 2707(d) for good faith reliance upon, without limitation, "a court warrant or order, . . . a legislative authorization, or a statutory authorization. . . ."

Indeed, while affirming the District Court's dismissal of the claims against the Banks based upon their "good faith reliance" defense, *Organizacion JD* at the same time remanded the claims against the United States by the JD

[8] These provisions are §§ 2516(3), 2518(7) and 2703(a).

claimants (who unlike Petitioners herein had prevailed at the *All Funds* trial) for a determination by the District Court as to whether the United States had complied with ECPA § 2703. *See* 18 F.3d at 94-95. Thus, Petitioners are incorrect in contending that the Second Circuit did not consider in *Organizacion JD* whether the Government had complied with the ECPA. *See* Petitioners' Br. at 23-26. The Court explicitly did address this issue, and held that whether or not the Government had so complied, the record in that case showed that the Banks had an absolute defense under §§ 2520(d) and 2707(d).

Moreover, when faced with the same argument by Petitioners, the Second Circuit in *Consolidated Cases* again explicitly held that the record fully established the Banks' good faith reliance defense. This affirmance of the District Court's factual determination is especially inappropriate for review by this Court.[9]

Any result other than that reached by the Second Circuit would place an impossible burden upon financial institutions by requiring them at their peril to independently determine—

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[9] Petitioners assert that the action must be remanded to permit discovery as to whether the Banks relied in good faith upon court orders issued pursuant to ECPA §§ 2516(3), 2518(7) and 2703(a). Petitioners' Br. at 27-31. As discussed above, however, the Banks' §§ 2520(d) and 2707(d) defense requires dismissal of Petitioners' claims without regard to whether the United States complied with §§ 2516(3), 2518(7) and 2703(a). Thus, the matters upon which Petitioners now maintain they need discovery are totally irrelevant to their purported claims against the Banks. In any case, under Fed. R. Civ. P. 56(f), the opponent of a summary judgment motion who claims to be unable to submit evidence in opposition because further discovery is needed must file an affidavit in the District Court explaining: (1) what facts are sought in discovery and how they are proposed to be obtained; (2) how those facts are reasonably expected to create a genuine issue of material fact; (3) what efforts the affiant has made to obtain those facts; and (4) why those efforts were unsuccessful. *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 926 (2d Cir. 1985). Petitioners submitted no such affidavit below. Accordingly, for this additional reason they cannot now be heard to assert that they need discovery.

before following warrants, orders, subpoenas and the like—that the party procuring the warrant or order (or in the case of the government the party giving the instructions) has complied with each and every legal obligation imposed on that party. This, of course, would fatally undermine the effectiveness and enforceability of instruments such as warrants, orders and subpoenas (particularly in exigent circumstances such as were present here), eviscerate the forfeiture laws and render salutary statutes such as §§ 2520(d) and 2707(d) entirely meaningless. It also would put banks in the untenable position of choosing between "Scylla and Charybdis," *i.e.*, of either risking liability for following warrants, orders, subpoenas, *etc.* that might at some future time be determined to have been faulty in some respect or risking liability for not immediately following court and other directives that in fact turn out to have been proper in every single respect. Requiring banks to make this sort of choice is not fair, is not good policy and is clearly not the law in any jurisdiction.

It is, in fact, a matter of well-settled law that financial institutions are permitted—indeed are required—to comply with facially appropriate legal directives given to them. *See, e.g., United States v. First National City Bank*, 396 F.2d 897, 898-99 (2nd Cir. 1968); *United States v. Bremicker*, 365 F. Supp. 701, 702-03 (D. Minn. 1973); *United States v. Jones*, 351 F. Supp. 132, 134 (M.D. Ala. 1972).

This encourages speedy compliance with warrants, orders, subpoenas and the like, while leaving fully available to any allegedly aggrieved person the right to seek relief against the Government in a forfeiture or other proceeding. Such a sensible balancing of competing interests is precisely what the ECPA and the forfeiture laws contemplate in the circumstances here.

As the District Court here recognized:

> [Banks] do not have all the relevant information and cannot make an independent determination of merit.
>
> Moreover, wire transfers occur at such speed . . . that the banks could not, even if they wished, take the time to evaluate orders before deciding whether to comply. Courts recognize that, at least vis-a vis government action, the nature of the property to be seized may justify swift action. . . .
>
> . . . [E]lectronic funds transfers occur almost instantaneously. The Government must be permitted to act swiftly. There is no time or warrant for any independent evaluation by the banks that would interfere with execution of national forfeiture policy. The claimants can and should look for protection in proceedings involving the Government. . . .

792 F. Supp. at 196. In this circumstance, "[t]he banks were acting as agents of the court and should be protected." *Id. See also K/S Norman Agathe v. Sea Trade & Construction, Ltd.*, 767 F. Supp. 60, 62-63 (S.D.N.Y. 1991) (bank acted as agent of court in executing writ of attachment and thus was entitled to court's protection). Consequently, the Banks' §§ 2520(d) and 2707(d) defense must prevail here, without regard to whether the United States itself complied with all legal requirements respecting Petitioners herein.

C. *Daccarett* Bars Any Claim By Petitioners That The United States Acted Wrongfully With Respect to Petitioners

In any case, even if Petitioners' claims against the Banks could be based upon the allegation that the United States acted wrongfully with regard to Petitioners (and clearly they cannot), such claims would be barred by the Second Circuit's decision in *Daccarett*—which explicitly holds that the Government *did* act properly concerning Petitioners and further that Petitioners had no ECPA claim against the Government.

In *Daccarett*, the Court: (a) upheld a jury verdict in *All Funds* requiring Petitioners herein, among other claimants, to forfeit to the United States the amounts of EFT's at issue; (b) affirmed the District Court's dismissal before trial of the ECPA counterclaims of Petitioners and other claimants against the United States; and (c) affirmed the District Court's denial of the motion by Petitioners and other claimants for judgment notwithstanding the verdict. *See* 6 F.3d at 43-59. In so doing, the Court made a number of dispositive holdings that compel denial of this petition (even assuming that the Banks might be held liable for the Government's purported failures, which as shown above the Banks cannot).

First, in upholding the jury verdict requiring forfeiture, the Second Circuit found, among other things, that:

> —The United States had fully complied with the Fourth Amendment and the rules governing the manner in which the United States may seize property under the forfeiture laws.[10]
>
> —The DEA subpoenas (upon which the Banks relied) had been properly issued.
>
> —The United States had probable cause for instituting a forfeiture proceeding.
>
> —The appellants and certain other claimants had failed at the two-month jury trial to establish by a preponderance of the evidence that they were "innocent owners" or

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[10] Significantly, under 21 U.S.C. 881(b), the Government may seize property by following the procedure set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or merely by having probable cause to believe the property is subject to forfeiture. *See Daccarett*, 6 F.3d at 46. The Government does *not* have to obtain a seizure warrant pursuant to Fed. R. Crim. P. 41(c), and thus is not required to obtain a probable cause finding by a judicial officer before it may seize property. *See Daccarett*, 6 F.3d at 46.

> that the EFT's in question were not traceable to drug transactions.[11]

6 F.3d at 46-57.

Furthermore, in affirming the District Court's dismissal of the ECPA counterclaims by a number of claimants (including Petitioners) against the Government, the Court in *Daccarett* held that no ECPA violation could have occurred, since no "device" was used. 6 F.3d at 54. *See* Point I above.

It would be anomalous—to say the least—for this Court now to contemplate that the *Banks* might be liable to Petitioners for the *Government's* alleged failure to comply with the ECPA, even though the Second Circuit in *Daccarett* explicitly ruled that the Government had acted entirely properly with respect to Petitioners and further that the Government itself could not be liable to Petitioners under the ECPA, and even though this Court declined to grant certiorari in *Daccarett*. It would also be highly anomalous for this Court to create a possibility of the Banks being liable to *these* Petitioners, who lost at trial in *All Funds*, when the Court has, by refusing to grant certiorari in *Organizacion JD*, let stand the dismissal of the ECPA claims against the Banks by the successful claimants in *All Funds*.

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[11] In this regard, the Court in *Daccarett* pointedly quoted from the District Court's decision that " 'the evidence of drug tainting was overwhelming'," and that the claimants, including Petitioners, had presented " 'implausible stories' " and " 'inconsistent positions.' " *Daccarett*, 6 F.3d at 57 (quoting *All Funds*, 801 F. Supp. at 992). And in affirming the District Court's denial of the J.N.O.V. motion, the Court in *Daccarett* further referred to the "overwhelming evidence linking the Atlantico Claimants [which included Petitioners] to drug trafficking and money laundering." 6 F.3d at 59.

III

EVEN IF THE SECOND CIRCUIT'S DECISION HERE WERE SOMEHOW INCORRECT, PETITIONERS STILL HAVE PROVIDED NO "SPECIAL AND IMPORTANT" REASONS FOR GRANTING THE WRIT

As shown above, the Second Circuit's decision here is correct and the petition should therefore be denied. But even if the decision were somehow arguably incorrect, Petitioners still have not offered any "special and important" reasons for granting the extraordinary writ of certiorari. This Court does not serve merely to correct alleged mistakes made by circuit courts. Because there is in no event any compelling basis for granting the writ, it should be denied for this reason as well.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
May 24, 1995

Respectfully submitted,

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ADDENDUM

ADDENDUM

STATUTES INVOLVED

18 U.S.C. § 2510: Definitions

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device

18 U.S.C. § 2511: Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . [or]

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . .

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal

course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(3)(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication—

. . .

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication

18 U.S.C. § 2520: Recovery of civil damages authorized

(d) **Defense.**—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . .

is a complete defense against any civil or criminal action brought under this chapter or any other law.

18 U.S.C. § 2701: Unlawful access to store communications

(a) **Offense.** —Except as provided in subsection (c) of this section whoever—

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility;

and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

(c) **Exceptions.** —Subsection (a) of this section does not apply with respect to conduct authorized—

(1) by the person or entity providing a wire or electronic communications service; [or]

(2) by a user of that service with respect to a communication of or intended for that user

18 U.S.C. § 2702: Disclosure of contents

(b) **Exceptions.** —A person or entity may divulge the contents of a communication— . . .

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication

18 U.S.C. § 2707: Civil action

(d) **Defense.** —A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . .

is a complete defense to any civil or criminal action brought under this chapter or any other law.

21 U.S.C. § 881: Forfeitures

(b) **Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure**

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims. . . , except that seizure without such process may be made when— . . .

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture . . .